TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 887.

R. J. DARNELL (INCORPORATED), PLAINTIFF IN ERROR,

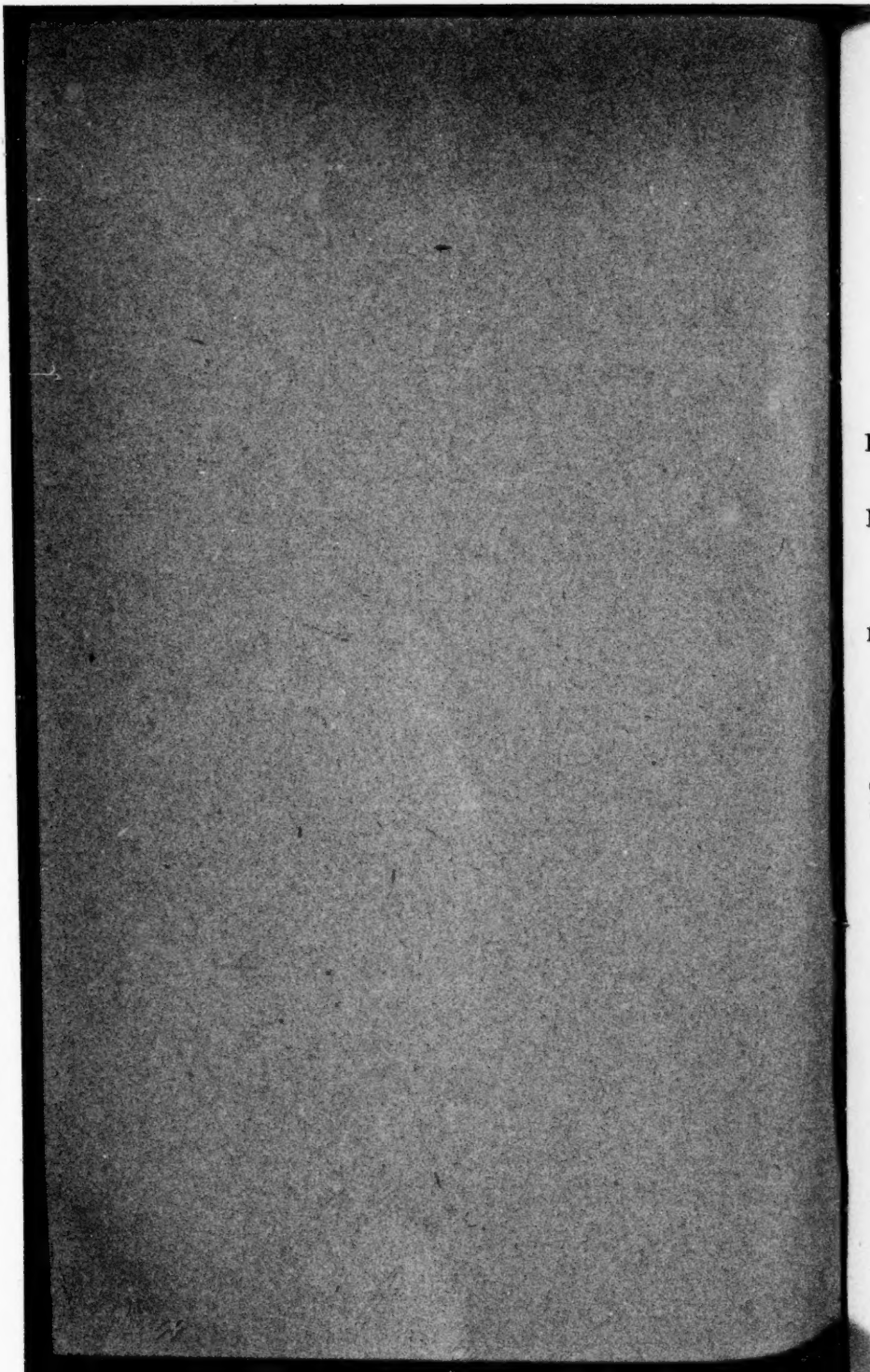
vs.

ILLINOIS CENTRAL RAILROAD COMPANY AND YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED DECEMBER 11, 1911.

(22,963)



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Statement of lumber shipments made by R. J. Darnell, Incorporated, via the Illinois Central R. R. Co. and the Yazoo & Mississippi Valley R. R. Co. from Memphis, Tennessee, to New Orleans, Louisiana, and to foreign ports via New Orleans, Louisiana, on which a rate of twelve cents per hundred weight freight was paid for the haul from Memphis to New Orleans.	4	3
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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 23, 1912.

a *Transcript of Record and Proceedings.*

R. J. DARNELL (INCORPORATED), Appellants,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY and YAZOO & MISSISSIPPI VALLEY RAILROAD CO., Appellees.

Percy & Hughes, Counsel for Appellant, Memphis, Tennessee.
Chas. N. Burch, H. D. Minor, Fitzhugh & Biggs, Counsel for Appellees, Memphis, Tennessee.

Error to the Circuit Court of the United States for the Western District of Tennessee.

McCall, Judge.

1 Filed June 24, 1911. Dan F. Elliotte, Clerk.

In the Circuit Court of the United States for the Western District of Tennessee.

No. 4122.

R. J. DARNELL, INCORPORATED,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY and YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

Declaration.

R. J. Darnell, Incorporated, a corporation of Tennessee sues the Illinois Central Railroad Company, a corporation of Illinois, and the Yazoo & Mississippi Valley Railroad Company, a corporation of Mississippi, for the sum of Ten Thousand Dollars, and for a cause of action avers:

That for many years plaintiff has been a manufacturer of hardwood lumber in the city of Memphis, and the defendants operate as partners in lines of railroad from Memphis to New Orleans. The Illinois Central Railroad Company owns all the stock of the Yazoo & Mississippi Valley Railroad, which has a line extending from Memphis to New Orleans, and of all the shipments hereinafter mentioned the defendants jointly and severally undertook the transportation, and collected the freight. The transportation from Memphis to New Orleans is interstate and the defendants, as far back as 1883, have promulgated a joint tariff making the rate on hardwood lumber from Memphis to New Orleans for export ten cents per hundred pounds, in car load lots. A charge of three-quarters of a cent per hundred pounds was made for handling lumber from the railroad terminals on to ship-board. This rate was reasonable and compensa-

tory and continued in force until February 2d, 1903, when, without justification, and in violation of the Interstate Commerce Act
2 requiring that all rates shall be reasonable, the defendants promulgated an illegal and unlawful tariff making the rate on hardwood lumber in car load lots twelve cents per hundred pounds from Memphis to New Orleans, and proceeded to collect from all shippers of hardwood lumber such excessive and extortionate rate. By the promulgation of such excessive tariff the defendants did deprive all persons who used said tariff of their property without due process of law to the extent of two cents per hundred pounds.

Plaintiff shipped to New Orleans, and also through New Orleans for export, 35,424,949 pounds of hardwood lumber over the lines of the defendants, beginning on the 20th day of January, 1905, and ending August 1st, 1908, and on all of this lumber paid the published tariff rate of twelve cents per hundred pounds for the transportation from Memphis to New Orleans, all the said lumber going for export. To the extent of two cents a hundred pounds, or $7084.89, the plaintiff was by the defendants, through the medium of this excessive and extortionate tariff, deprived of *their* property. A complete list of these shipments, giving the dates of the shipments, the car number, and the place of destination is set forth in the bill of particulars annexed to this declaration.

On June 20, 1907, J. W. Thompson Lumber Company, and others, manufacturers and shippers of hardwood lumber from Memphis to New Orleans for export, filed their petitions before the Interstate Commerce Commission against the Illinois Central Railroad Company, attacking the validity of the advance in rate from ten cents per hundred pounds to twelve cents per hundred pounds on hardwood lumber, which had been made effective by the tariff on February 24, 1903. The said petition was contested by the defendant carriers, testimony was taken, argument was had and on the first of June, 1908, an order was made by the Interstate Commerce
3 Commission directing the defendants to desist from enforcing the said tariff and fixing the maximum rate which the defendants could charge for such transportation of hardwood lumber from Memphis to New Orleans at ten cents per hundred pounds. In obedience to this judgment the defendants made effective from August 1st, 1908, a tariff of ten cents per hundred pounds on hardwood lumber in car load lots moving from Memphis to New Orleans. Pursuant to further proceedings had in such case before the Commission, reparation was awarded for sundry amounts to the petitioners. This plaintiff was not a party to said proceeding. It now avers that the original rate of ten cents per hundred pounds from Memphis to New Orleans which prevailed for a number of years up to February 2nd, 1903, and which was restored in obedience to the orders of the Interstate Commerce Commission on the first of August, 1908, and is still in effect, was the maximum of reasonableness which the defendants were entitled to charge for such service. Any sums collected in excess of that amount were illegally and unlawfully collected, and the tariffs making such collections possible deprived the

plaintiff of its property to the extent hereinabove mentioned without due process of law.

Wherefore, the plaintiff says that the defendants severally and jointly owe it the said sum of $7084.89, with interest from the date of each payment, for which it brings its suit and prays judgment and all costs.

PERCY & HUGHES,
Attorneys for Plaintiff.

I will be surety for cost.
W. A. PERCY.

4 *Statement of Lumber Shipments Made by R. J. Darnell, Incorporated, via the Illinois Central Railroad Company, and the Yazoo & Mississippi Valley Railroad Company, from Memphis, Tenn., to New Orleans, La., and to Foreign Ports via New Orleans, La., on which a Rate of Twelve Cents per cwt. Freight was Paid for the Haul from Memphis to New Orleans.*

Date.	Car No.	Final destination.	Weight.
1/20-05	22702	New Orleans	36700
3/3 -"	33456	" "	52900
3/6 -"	38454	" "	59500
3/12-"	35556	" "	53500
3/21-"	23004	" "	51700
3/25-"	41083	" "	48400
3/31-"	21446	" "	43300
4/15-"	37788	" "	50300
4/26-"	35270	" "	58600
4/29-"	23869	" "	41300
3/29-"	37173	" "	55400
5/25-"	45909	" "	76000
5/25-"	45747	" "	48200
6/29-"	12066	" "	46400
7/17-"	39131	" "	39900
8/13-"	14742	" "	33300
9/23-"	11695	" "	40000
9/23-"	11695	" "	41400
9/26-"	6272	" "	44100
9/27-"	42957	" "	33600
10/3 -"	45450	" "	32000
10/20-"	96091	" "	55000
1/21-06	4211	" "	43300
1/2 -"	1287	" "	33300
1/7 -"	23029	" "	57500
1/21-"	45972	" "	51700
4/21-"	39809	" "	41400
4/11-"	35823	" "	44500
4/11-"	21098	" "	45400
4/14-"	34258	" "	47500

5/4 -"	36530	"	"		44900
5/26-"	35551	"	"		31200
7/18-"	24063	"	"		60000
7/24-"	38072	"	"		61100
8/22-"	23107	"	"		56100
	24175	"	"		48900
8/24-"	36525	"	"		51600
8/30-"	39213	"	"		54700
8/31-"	38029	"	"		50100
9/4 -"	26491	"	"		59300
9/9 -"	37610	"	"		61600
9/23-"	27609	"	"		56400
12/6 -"	47725	"	"		65300
12/21-"	11191	"	"		41000
10/10-"	21500	"	"		46500
10/13-"	13379	"	"		37200
10/16-"	21086	"	"		42500
10/18-"	48183	"	"		50300
8/2 -"	22123	"	"		44900

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Date.	Car No.	Final destination.		Weight.
1/31-07	33818	New	Orleans	50200
1/3 -"	23590	"	"	43600
1/4 -"	21529	"	"	51500
1/28-"	37849	"	"	55600
2/19-"	130935	"	"	46400
2/21-"	49143	"	"	52700
2/23-"	46125	"	"	52900
4/15-"	33522	"	"	39600
5/29-"	23876	"	"	54300
7/22-"	24613	"	"	20900
9/25-"	34609	"	"	39600
4/30-08	46511	"	"	53900
1/22-"	14423	"	"	21100
Fwd				2951000

5½

Date.	Car No.	Final destination.		Weight.
Fwd.				2951000
10/27-05	36645	Liverpool,	Eng	64300
"/4 -"	35303	Antwerp,	Bel	53800
10/25-"	22697	"	"	71600
10/27-"	46282	"	"	60300
10/19-"	44116	Bremen,	Ger	47300
10/3 -"	36942	Bristol,	Eng	33100
10/4 -"	26760	Antwerp,	Bel	49100
10/7 -"	22639	London,	Eng	60500
10/7 -"	37322	Glasgow,	Scot	65500
10/8 -"	36997	"	"	45400

10/9 -"	33789	Antwerp, Bel	55800
10/12-"	24375	" "	54500
10/12-"	21712	Glasgow, Scot	41700
10/14-"	38817	Hamburg, Ger	40400
10/14-"	38346	Antwerp, Bel	59200
10/16-"	37605	Glasgow, Scot	29700
10/21-"	33450	Hamburg, Ger	42800
10/23-06	33617	Rotterdam, Holland	50000
10/13-"	35823	Hamburg, Germany	45800
10/22-"	33078	Rotterdam, Holland	49800
2/13-07	6691	Hamburg, Germany	49400
2/15-"	22782	Hamburg, Germany	58100
2/16-"	45992	Hamburg, Germany	44700
2/21-"	38932	Hamburg, Germany	39700
2/23-"	26695	Hamburg, Germany	34700
2/11-08	140749	Antwerp, Belgium	59500
2/18-08	40096	London, England	46800
3/16-"	21124	Hamburg, Germany	42800
3/27-"	26434	Hamburg, Germany	39300
4/3 -"	38878	Antwerp, Belgium	52600
4/7 -"	141950	Antwerp, Belgium	46200
4/9 -"	23349	Rotterdam, Holland	51300
3/10-"	37629	London, England	54000
4/14-"	38355	Antwerp, Belgium	51100
4/17-"	131076	Antwerp, Belgium	50500
4/21-"	141642	Bremen, Germany	53800
4/25-"	17718	Hamburg, Germany	38900
4/25-"	21467	Hamburg, Germany	62000
4/27-"	21106	Hamburg, Germany	57700
4/29-"	38815	Antwerp, Belgium	55100
3/19-"	12630	Hamburg, Germany	49700
3/24-"	16061	Hamburg, Germany	50900
3/27-"	24005	Hamburg, Germany	54900
3/28-"	35733	Rotterdam, Holland	45500
3/28-"	35574	Antwerp, Belgium	46200
4/8 -07	26472	Hamburg, Germany	53300
4/10-"	21907	Hamburg, Germany	46400
4/15-"	37361	Hamburg, Germany	47800
4/29-"	21594	Hamburg, Germany	47900
5/4 -"	130086	Hamburg, Germany	34960
5/4 -"	38614	Hamburg, Germany	38000
5/8 -"	130272	Hamburg, Germany	48400
5/30-"	33054	Barcelona, Spain	50300
5/8 -"	24861	Antwerp, Belgium	49200
5/11-"	141563	Antwerp, Belgium	63000
5/14-"	142012	Liverpool, England	59300
5/19-"	140250	Liverpool, England	40300
5/22-"	23634	London, England	62800
5/22-"	23634	London, England	62800
6/9 -"	142824	London, England	60900
6/12-"	141036	London, England	51300

6/26-"	20942	Antwerp, Belgium	50000
6/22-"	141382	Bristol, England	55700
6/30-"	24658	Antwerp, Belgium	61400
6/7 -"	48765	Hamburg, Germany	51800
6/8 -"	22445	Hamburg, Germany	30500
6/12-"	33894	Hamburg, Germany	53100
6/20-"	35425	Glasgow, Scotland	42500
	Fowd		6305800

6

	Fowd		6305800
6/24-07	22034	Antwerp, Belgium	59000
6/28-"	34079	Hamburg, Germany	54900
7/20-"	34586	London, England	48600
7/26-"	15447	London, England	39400
7/31-"	48700	London, England	52300
7/3 -08	142085	Rotterdam, Holland	49200
7/3 -"	140852	Rotterdam, Holland	39900
7/3 -"	141591	Antwerp, Belgium	62900
7/3 -"	24216	Antwerp, Belgium	58600
7/6 -"	13585	Rotterdam, Holland	38700
7/8 -"	35470	Rotterdam, Holland	51400
7/8 -"	24910	Belfast, Ireland	62600
7/9 -"	49363	London, England	32800
6/12-"	46761	Liverpool, England	54100
7/14-"	142176	London, England	52200
7/14-"	22123	Hamburg, Germany	51500
7/17-"	36578	Antwerp, Belgium	54000
7/23-"	23499	London, England	60800
7/25-"	38708	Liverpool, England	56900
8/3 -07	20980	Antwerp, Belgium	48400
8/5 -"	36243	London, England	50400
8/6 -"	22850	Antwerp, Belgium	56200
8/7 -"	37229	Hamburg, Germany	55700
8/8 -"	10881	London, England	47600
8/9 -"	11834	Hamburg, Germany	42900
8/28-"	38768	Antwerp, Belgium	42000
8/9 -"	20111	Antwerp, Belgium	32800
8/12-"	21913	London, England	46000
8/15-"	10132	Hamburg, Germany	42200
8/16-"	19770	London, England	46700
8/2 -"	20472	London, England	40900
8/24-"	21244	Antwerp, Belgium	38500
8/27-"	20616	London, England	49100
8/28-"	36459	Antwerp, Belgium	48700
8/28-"	45362	London, England	48400
8/31-"	23243	Hamburg, Germany	48900
8/25-"	11855	Hamburg, Germany	33600
8/28-"	20979	Hamburg, Germany	61800
9/5 -"	38031	Hamburg, Germany	42500
9/6 -"	21766	London, England	42200

9/9 -"	17272	Hamburg, Germany	43100
9/10-"	22870	Antwerp, Belgium	44300
9/10-"	21184	London, England	49900
9/11-"	21270	London, England	51700
9/12-"	13897	Glasgow, Scotland	48700
9/13-"	38084	London, England	48100
9/14-"	38269	Hamburg, Germany	40100
9/15-"	19756	Glasgow, Scotland	34900
9/17-"	47810	London, England	67800
9/17-"	22646	London, England	46600
9/17-"	33923	Antwerp, Belgium	49100
9/19-"	24904	Antwerp, Belgium	53000
9/19-"	21269	Hamburg, Germany	46500
9/21-"	39065	Antwerp, Belgium	44000
9/21-"	48888	London, England	50900
9/24-"	33743	London, England	45700
9/26-"	21452	London, England	52700
9/27 "	39593	London, England	43200
9/30-"	36249	Antwerp, Belgium	45500
9/7 -06	46327	Hamburg, Germany	58700
9/17-"	35814	Liverpool, England	39200
9/18-"	37290	Hamburg, Germany	50200
10/1 -07	131273	Antwerp, Belgium	42800
10/3 -"	46000	London, England	51700
10/4 -"	23350	Antwerp, Belgium	41000
10/4 -"	24084	Antwerp, Belgium	44300
10/7 -"	130903	Antwerp, Belgium	43900
10/7 -"	22392	Antwerp, Belgium	48200
Fwd.			9576900

7

Fwd.			9576900
10/10-07	131092	Antwerp, Belgium	43900
10/14-"	34509	London, England	44300
10/18-"	23143	Antwerp, Belgium	46600
10/25-"	47468	Antwerp, Belgium	43400
10/24-"	45004	London, England	47300
10/24-"	33371	London, England	48500
10/26-"	131109	London, England	49100
10/28-"	24517	London, England	63400
10/29-"	37181	Antwerp, Belgium	42300
10/29-"	8216	Hamburg, Germany	47400
11/1 -"	150857	Antwerp, Belgium	43800
11/6 -"	20811	Copenhagen, Denmark	41700
11/6 -"	39275	London, England	51100
11/9 -"	23222	Antwerp, Belgium	46400
11/13-"	46004	Hamburg, Germany	48400
11/21-"	23949	London, England	52000
11/22-"	35524	Antwerp, Belgium	52200
11/23-"	39843	London, England	54700
11/29-"	39343	London, England	29499

11/29-"	42741	Manchester, England	30000
11/28-"	20245	Liverpool, England	30000
11/30-"	33928	Liverpool, England	30000
11/30-"	36694	Liverpool, England	51600
12/1 -06	34627	London, England	39200
12/14-"	37477	Barcelona, Spain	35300
12/27-"	35182	Barcelona, Spain	47800
12/2 -07	34430	Glasgow, Scotland	40300
12/4 -"	12620	Antwerp, Belgium	52900
12/4 -"	12961	Liverpool, England	51500
12/4 -"	12961	Liverpool, England	51500
12/5 -"	45093	London, England	51200
12/9 -"	47114	Antwerp, Belgium	48900
12/9 -"	14332	London, England	45500
12/14-"	12536	Glasgow, Scotland	43400
12/17-"	46496	Antwerp, Belgium	48400
12/19-"	48314	Manchester, England	48900
12/28-"	26429	London, England	51500
12/26-"	21985	London, England	41300
2/16-05	38405	Glasgow, Scotland	65300
2/17-"	45270	Glasgow, Scotland	62900
2/19-"	24742	London, England	68200
2/12-"	36518	Antwerp, Belgium	63700
2/22-"	21198	Manchester, England	64900
2/22-"	23699	Rotterdam, Holland	30800
2/25-"	21993	Manchester, England	64400
3/1 -"	23136	London, England	71250
3/1 -"	3003	Bremen, Germany	41200
3/1 -"	11749	Barcelona, Spain	38100
3/1 -"	45028	Avonmount, England	46400
3/2 -"	23733	London, England	48200
3/3 -"	24680	London, England	71000
3/11-"	24222	Antwerp, Belgium	68600
3/14-"	36296	London, England	67100
3/16-"	21863	Liverpool, England	59400
3/18-"	45328	London, England	61900
3/25-"	39638	Rotterdam, Holland	52300
3/28-"	21952	Manchester, England	40000
3/30-"	36599	Rotterdam, Holland	51500
3/30-"	23779	Bremen, Germany	49700
4/1 -"	13696	Antwerp, Belgium	43700
4/2 -"	21495	Rotterdam, Holland	56100
4/4 -"	34811	Hull, England	34800
4/5 -"	45617	Bremen, Germany	43700
4/6 -"	19620	Hamburg, Germany	36700
4/4 -"	19275	Hamburg, Germany	43500
4/9 -"	23821	Glasgow, Scotland	34900
4/10-"	8761	Glasgow, Scotland	32200
Fwd.			12824549

8

Date.	Car No.	Final destination.	Weight.
11/6 -06	21908	Hamburg, Germany	41800
11/19- "	13946	Glasgow, Scotland	47100
1/3 - "	15768	Glasgow, Scotland	51400
1/3 - "	66040	Glasgow, Scotland	51500
1/4 - "	23091	Glasgow, Scotland	48700
1/4 - "	36429	Antwerp, Belgium	45200
1/5 - "	45351	London, England	59200
1/5 - "	30714	Antwerp, Belgium	50700
1/5 - "	42044	Rotterdam, Holland	47600
1/5 - "	45385	Antwerp, Belgium	45300
1/6 - "	2604	Antwerp, Belgium	52300
1/8 - "	37040	London, England	53000
1/11- "	23932	London, England	57200
1/15- "	36691	Antwerp, Belgium	40000
1/15- "	23861	Antwerp, Belgium	46500
1/18- "	33577	Antwerp, Belgium	59300
1/19- "	21016	Manchester, England	38100
1/20- "	23895	Hamburg, Germany	40900
1/20- "	19126	Bremen, Germany	46800
1/24- "	45511	London, England	55800
1/26- "	24008	London, England	57300
1/26- "	38748	Antwerp, Belgium	66800
1/26- "	40121	Antwerp, Belgium	35700
1/27- "	7444	Antwerp, Belgium	47500
1/31- "	23888	Rotterdam, Holland	43800
1/31- "	33277	Rotterdam, Holland	46600
1/31- "	4043	Liverpool, England	36300
12/5 -05	36228	Hamburg, Germany	52700
12/7 - "	26788	Antwerp, Belgium	53900
12/7 - "	45560	Rotterdam, Holland	56700
12/8 - "	31539	London, England	50400
12/9 - "	83090	London, England	40550
12/9 - "	33064	Rotterdam, Holland	49500
12/9 - "	38572	London, England	51600
12/9 - "	22911	Antwerp, Belgium	45700
12/11- "	33683	Liverpool, England	55000
12/12- "	17820	Hamburg, Germany	52700
12/13- "	39994	Hamburg, Germany	41600
12/22- "	24406	Rotterdam, Holland	49400
12/27- "	37405	Liverpool, England	50100
12/29- "	4133	Antwerp, Belgium	45200
12/29- "	35010	Antwerp, Belgium	57000
12/30- "	82218	Antwerp, Belgium	46400
11/1 - "	38791	Bremen, Germany	44900
11/3 - "	14604	Glasgow, Scotland	51400
11/3 - "	37164	Glasgow, Scotland	46800
11/4 - "	23388	London, England	55200
11/4 - "	35772	London, England	63700

11/18-"	42930	London, England	37300
11/24-"	20666	Antwerp, Belgium	43900
11/25-"	20542	Rotterdam, Holland	44700
11/30-"	23925	Antwerp, Belgium	48800
11/30-"	30213	Antwerp, Belgium	59900
11/30-"	34940	London, England	56700
11/3 -"	24906	Rotterdam, Holland	68700
11/6 -"	11969	Antwerp, Belgium	42400
11/6 -"	18198	Liverpool, England	50200
11/9 -"	36607	Rotterdam, Holland	61900
11/13-"	37709	Antwerp, Belgium	45400
11/13-"	7177	Liverpool, England	42700
11/13-"	22464	Barcelona, Spain	37000
11/15-"	21483	Barcelona, Spain	47800
11/16-"	13672	Hamburg, Germany	46200
11/16-"	80139	Hamburg, Germany	42000
11/18-"	37015	Hamburg, Germany	42000
6/1 -07	14840	Antwerp, Belgium	49900
6/5 -"	33902	London, England	57500
6/5 -"	22252	London, England	52700
6/5 -"	24720	London, England	61300
6/5 -"	23284	London, England	27700
Forward			16264099

9

Date.	Car No.	Final destination.	Weight.
Forward			16264099
6/11-07	23674	London, England	48800
6/12-"	21676	London, England	56700
6/12-"	26900	London, England	51400
6/12-"	49075	Antwerp, Belgium	49500
6/13-"	21011	Antwerp, Belgium	50200
6/14-"	39537	Antwerp, *England*	46000
6/18-"	15399	Liverpool, England	40800
6/18-"	45344	Antwerp, Belgium	53900
6/19-"	34695	Antwerp, Belgium	50300
6/25-"	35755	Antwerp, Belgium	44300
6/29-"	35289	London, England	53000
7/2 -"	33133	London, England	42500
7/12-"	12119	London, England	45300
7/12-"	25134	Antwerp, *England*	42000
7/19-"	35287	London, England	43500
7/20-"	13064	London, England	33100
1/2 -08	26906	New Castle, England	39600
1/2 -"	42223	London, England	52400
1/10-"	16221	Antwerp, *England*	39400
1/10-"	48649	Manchester, England	48200
1/15-"	14859	Belfast, Ire	48400
1/18-"	36805	Antwerp, Belgium	53200
1/7 -"	34859	Liverpool, England	39100

1/30-"	45124	Hamburg, *England*	49500
8/1 -05	36930	Manchester, England	55800
8/3 -"	34954	Manchester, England	52900
8/3 -"	22489	Hamburg, Germany	51200
8/6 -"	35846	Bremen, Germany	47100
8/7 -"	13443	Liverpool, England	41900
8/7 -"	11841	London, England	46500
8/10-"	34879	Antwerp, Belgium	44500
8/11-"	11351	Antwerp, Belgium	43400
8/13-"	17424	Antwerp, Belgium	43200
8/17-"	21469	London, England	44700
8/17-"	19497	Liverpool, England	39700
8/17-"	21566	London, England	40600
8/22-"	13185	London, England	53000
8/23-"	23467	Antwerp, Belgium	53900
8/24-"	38915	London, England	52900
8/24-"	35236	London, England	65100
8/25-"	21155	Antwerp, Belgium	59900
8/27-"	22730	London, England	45000
8/31-"	15551	Hamburg, Germany	42800
2/1 -06	17951	Hamburg, Germany	38200
2/12-"	17951	Hamburg, Germany	49900
2/2 -"	23418	London, England	53200
2/3 -"	80557	Antwerp, Belgium	56300
2/3 -"	45931	London, England	63500
2/7 -"	45900	London, England	57200
2/7 -"	22392	London, England	49000
2/13-"	22399	Bremerhaven, Germany	40600
2/19-"	38447	Hamburg, Germany	58100
2/23-"	46188	Antwerp, *Germany*	46200
2/24-"	34980	Glasgow, Scotland	47500
2/27-"	34102	London, England	43100
3/3 -"	45509	Antwerp, Belgium	54600
3/6 -"	21512	Antwerp, Belgium	53200
3/7 -"	23157	Antwerp, Belgium	53200
3/9 -"	22967	Antwerp, Belgium	53000
3/14-"	33511	Rotterdam	39800
3/17-"	571	Rotterdam	43600
3/17-"	19205	Antwerp, Belgium	50900
3/24-"	21029	Hamburg, Germany	47600
3/27-"	45228	Hamburg, Germany	53200
3/29-"	35759	Antwerp, Belgium	49000
4/3 -"	22747	Antwerp, Belgium	51900
4/6 -"	39722	Antwerp, Belgium	45400
Fwd.			19507499

10

Date.	Car No.	Final destination.	Weight.
Forward			19507499
4/11-06	33411	Antwerp, Belgium	43800
" " - "	20144	Rotterdam	40700
"/16- "	13555	Antwerp, Belgium	62300
" " - "	20879	Antwerp, Belgium	45200
" " - "	45604	Antwerp, Belgium	47300
" " - "	10153	Rotterdam	38100
" " - "	22094	London, England	45400
4/18- "	38466	Hamburg, Germany	47600
" " - "	37014	Antwerp, Belgium	41900
"/19- "	14943	Bremen, Germany	49700
"/20- "	38597	Antwerp, Belgium	51600
4/ " - "	24268	London, England	50500
4/21- "	13474	Antwerp, Belgium	39700
"/23- "	46501	Antwerp, Belgium	43800
"/25- "	36707	Antwerp, Belgium	42200
" " - "	11502	Antwerp, Belgium	43000
" " - "	37807	Manchester, England	45400
"/27- "	35481	Antwerp, Belgium	55800
" " - "	21180	Bremen, Germany	48400
"/30- "	21711	Antwerp, Belgium	40400
" " - "	34908	" "	41800
6/1 - "	14746	" "	50600
" " - "	37308	" "	46400
" " - "	34129	" "	65100
" " - "	26163	" "	52500
" " - "	45206	" "	54300
" " - "	34235	" "	71800
" " - "	24148	" "	70900
"/4 - "	13603	" "	55600
"/5 - "	39903	" "	58600
" " - "	39199	" "	48900
"/7 - "	36050	" "	62200
" " - "	34049	" "	43500
"/9 - "	42747	Christiana	31700
"/18- "	22950	Antwerp, Belgium	52500
"/14- "	26702	" "	42300
"/15- "	20927	" "	42200
" " - "	16316	" "	41100
"/16- "	24210	" "	55000
"/23- "	38711	London, England	47800
"/25- "	23528	" "	49700
"/21- "	23791	Antwerp, Belgium	52300
" " - "	36718	" "	66900
"/28- "	35895	London, England	47400
"/29- "	20759	Hamburg, Germany	51100
"/30- "	23483	London, England	46300
5/3 - "	37848	Antwerp, Belgium	54600

" "-"	21408	Antwerp, Belgium	46100
"/7 -"	22641	" "	59300
4/" -"	45223	Hamburg, Germany	50700
5/9 -"	21641	Antwerp, *Germany*	46300
5/9 -"	14291	Hamburg, Germany	47600
5/9 -"	47578	London, England	53900
"/10-"	21248	London, England	48500
" "-"	22715	Antwerp, Belgium	40300
"/11-"	45018	London, England	47100
"/12-"	21999	Liverpool, England	48000
"/14-"	12190	Antwerp, Belgium	40000
"/15-"	23631	" "	49800
" "-"	10472	" "	40600
" "-"	61606	" "	55600
"/17-"	37266	London, England	50600
"/18-"	39372	Antwerp, Belgium	38100
" "-"	22154	Belfast	41100
"/21-"	23583	Antwerp, Belgium	56200
" "-"	46528	" "	59900
Forward			22755199

11

Date.	Car No.	Final destination.	Weight.
Forward			22755199
5/22-06	21290	Antwerp, Belgium	57300
" "-"	11857	" "	40900
"/23-"	13017	" "	50400
" "-"	22602	" "	54800
"/24-"	38426	" "	43000
" "-"	23183	" "	66900
"/25-"	18041	" "	41100
" "-"	35738	" "	40500
"/26-"	8963	" "	50400
" "-"	36646	" "	61300
"/28-"	47040	" "	53300
"/29-"	38662	" "	48900
" "-"	20163	" "	40600
"/30-"	4722	" "	53300
"/31-"	22184	" "	49900
" "-"	34255	" "	64000
" "-"	37032	" "	56900
1/8 -08	47494	Liverpool, England	39600
1/12-07	23806	London, England	55900
1/15-"	21000	Manchester, England	35700
1/17-"	21898	Rotterdam	52400
"/19-"	22628	"	47800
"/21-"	48626	"	56200
"/25-"	21771	Antwerp, Belgium	53400
" "-"	23560	Rotterdam	52100
"/28-"	42011	Antwerp, Belgium	56300

" "-"	42625	London, England	49900
12/1 -06	23871	London, England	57300
"/6 -"	17884	Antwerp, Belgium	37300
"/10-"	24054	Antwerp, Belgium	51000
"/12-"	24644	London, England	59600
"/13-"	13927	Liverpool, England	51300
"/15-"	25458	Antwerp, Belgium	43700
"/19-"	33668	Liverpool, England	54000
"/22-"	18489	Bremen, Germany	53900
"/24-"	24218	London, England	54800
"/24-"	22076	London, England	52800
"/29-"	33783	London, England	55100
"/31-"	22027	London, England	54300
11/1 -"	38257	London, England	58900
"/1 -"	13051	London, England	46300
"/3 -"	15793	London, England	46100
"/8 -"	46853	Antwerp, Belgium	38300
"/8 -"	33234	London, England	41600
"/12-"	12819	Antwerp, Belgium	47000
"/14-"	20235	Antwerp, Belgium	44500
"/14-"	47994	Antwerp, Belgium	43400
"/17-"	26481	Christiana	52300
"/17-"	23218	Manchester	60900
"/30-"	36229	Antwerp, Belgium	58700
10/2 -"	20636	Antwerp, Belgium	61200
"/15-"	48687	Antwerp, Belgium	54800
"/26-"	24889	Antwerp, Belgium	61100
"/4 -"	25147	Bristol	70100
"/7 -"	45578	Bristol	47700
"/17-"	21969	Bristol	60400
"/19-"	37342	Antwerp, Belgium	41300
"/24-"	35160	London, England	52300
"/25-"	46736	London, England	41800
"/26-"	23940	Antwerp, Belgium	60900
"/27-"	37543	London, England	50200
"/29-"	14421	London, England	43800
"/30-"	37830	London, England	45500
9/27-"	25069	Antwerp, Belgium	51800
"/27-"	23438	Antwerp, Belgium	46900
8/6 -"	23361	London, England	53000
"/7 -"	45674	Rotterdam	52100
Fwd.			26185999

12

Date.	Car No.	Final destination.	Weight.
Forward			26185999
8/2 -06	24192	Hamburg, Germany	51300
"/10-"	45135	London, England	50700
"/17-"	39243	Hamburg, Germany	52000
"/16-"	37275	Liverpool, England	39500

"/17-"	18368	Liverpool, England	41400
7/2 -"	18368	London, England	50000
"/3 -"	33742	London, England	66900
"/3 -"	8331	Liverpool, England	35500
"/5 -"	34866	Glasgow, Scotland	51600
" "-"	34049	Hamburg, Germany	43500
"/18-"	17525	Hamburg, Germany	46700
"/20-"	24935	Belfast, Ireland	53200
"/21-"	24286	London, England	55700
"/25-"	26965	Hamburg, Germany	46600
"/26-"	21728	London, England	52500
"/28-"	39836	Liverpool, England	46000
"/28-"	35204	Hamburg, Germany	48300
6/15-05	23072	London, England	55700
"/15-"	26469	Liverpool, England	46300
"/16-"	33533	Antwerp, Belgium	48300
"/19-"	33582	London, England	48200
"/20-"	24551	London, England	47700
"/21-"	36440	Rotterdam	43200
"/25-"	23000	London, England	57100
7/15-"	18486	London, England	28800
"/15-"	46122	Rotterdam	54100
"/19-"	45817	Glasgow, Scotland	42900
"/18-"	4331	Rotterdam	40100
"/20-"	2442	Antwerp, Belgium	56400
"/28-"	33677	Bremen	59200
"/28-"	22512	London, England	29400
"/30-"	24948	London, England	48800
9/1 -"	33071	London, England	44700
"/7 -"	36703	London, England	50200
"/9 -"	35870	London, England	55300
"/9 -"	36968	London, England	54600
"/12-"	37929	London, England	61200
"/14-"	26855	London, England	48900
"/15-"	34269	London, England	49100
"/18-"	35236	Liverpool, England	57300
"/23-"	36929	Liverpool, England	48900
"/28-"	24470	Hamburg, Germany	43200
"/30-"	38245	Antwerp, Belgium	60300
5/1 -07	49166	Antwerp, Belgium	62500
"/1 -"	47365	Rotterdam	39900
"/3 -"	39809	Antwerp, Belgium	56800
"/3 -"	24422	London, England	55600
"/5 -"	23328	Antwerp, Belgium	50800
"/10-"	47360	Antwerp, Belgium	51500
"/10-"	24956	Antwerp, Belgium	49000
"/10-"	21499	Antwerp, Belgium	55700
"/13-"	37851	Antwerp, Belgium	59000
"/13-"	24176	London, England	55400
"/14-"	34839	London, England	56300
"/15-"	23087	Antwerp, Belgium	54800

"/16-"	21579	London, England	52900
"/17-"	36681	Antwerp, Belgium	54400
"/17-"	45012	Liverpool, England	61300
"/18-"	25138	London, England	53200
"/24-"	33522	Liverpool, England	42300
"/24-"	38485	London, England	49600
"/24-"	21439	London, England	51100
"/25-"	47137	London, England	52100
"/25-"	8812	Liverpool, England	47600
"/27-"	34091	Antwerp, Belgium	46500
Forward			29455699

13

Date.	Car No.	Final destination.	Weight.
Forward			29455699
5/27-07	39732	London, England	45200
"/28-"	21017	London, England	49400
"/28-"	39739	London, England	51900
"/29-"	12788	London, England	33800
"/29-"	23604	Antwerp, Belgium	51500
"/30-"	25394	Antwerp, Belgium	46400
"/31-"	24694	Antwerp, Belgium	56700
"/31-"	36718	London, England	45600
4/3 -"	38876	Manchester, England	53300
"/4 -"	22477	London, England	30000
"/8 -"	37360	London, England	51700
"/11-"	37259	Havre, France	50600
"/12-"	35813	Manchester, England	53000
"/18-"	48333	London, England	53100
"/16-"	36027	London, England	53800
"/22-"	36663	Manchester, England	48600
"/23-"	45473	Liverpool, England	51100
"/25-"	11654	London, England	38900
"/26-"	39024	Rotterdam	45700
"/27-"	25505	London, England	57000
"/29-"	130632	Antwerp, *England*	57100
3/23-"	24910	Manchester, England	56000
"/1 -"	36275	Antwerp, Belgium	38600
"/1 -"	25495	London, England	47200
"/7 -"	38850	London, England	53100
"/8 -"	22718	London, England	56100
"/20-"	22569	London, England	52900
"/26-"	33513	London, England	52500
"/30-"	38940	Rotterdam	40000
2/2 -"	37521	London, England	51500
"/4 -"	37531	Antwerp, Belgium	58700
"/5 -"	25157	Antwerp, Belgium	62100
"/11-"	34958	London, England	42900
"/11-"	24682	London, England	52200
"/11-"	11479	Manchester, England	44900

"/14- "	47981	Antwerp, Belgium	58600
"/14- "	25006	Antwerp, Belgium	51000
"/16- "	47283	Antwerp, Belgium	57800
"/21- "	37961	Rotterdam	50700
"/21- "	34297	Rotterdam	52100
"/21- "	21800	London, England	31400
"/23- "	47226	Antwerp, Belgium	37800
1/3 -05	41164	Rotterdam	35200
1/6 - "	26509	London, England	55700
"/7 - "	12775	London, England	50800
"/8 - "	35473	London, England	64100
11/9 -04	20957	London, England	58100
1/19-05	38225	Rotterdam	53100
1/20- "	24808	London, England	56200
1/26- "	45523	London, England	38700
"/28- "	14656	Hull, England	50600
"/30- "	6311	Antwerp, Belgium	31200
12/1 -04	35806	Glasgow, Scotland	62100
"/3 - "	8920	Glasgow, Scotland	45600
"/12- "	19325	London, England	45300
"/13- "	15271	London, England	47000
"/16- "	11005	London, England	50100
"/16- "	33698	Liverpool, England	35700
"/18- "	6928	London, England	45000
"/20- "	23357	Antwerp, Belgium	52100
"/21- "	8434	London, England	40100
"/21- "	15083	London, England	48700
"/23- "	24278	Liverpool, England	46000
"/23- "	6914	Liverpool, England	42000
"/24- "	17300	London, England	48100
"/28- "	13891	Bristol	54700
Forward			32684399

14

Date.	Car No.	Final destination.	Weight.
Forward			32684399
11/1 -04	23913	London, England	44500
"/4 - "	23331	Liverpool, England	47100
"/4 - "	7026	Liverpool, England	49900
"/4 - "	17285	London, England	40800
"/7 - "	2971	London, England	43800
"/10- "	26675	London, England	53050
"/12- "	20536	Bristol, England	42500
"/14- "	14618	London, England	45200
11/17-04	7589	Antwerp, Belgium	48200
"/17- "	15611	Antwerp, Belgium	47800
"/19- "	26876	Antwerp, Belgium	58300
"/26- "	19526	London, England	39000
10/5 - "	1718	London, England	41500
"/6 - "	14527	London, England	50200

"/6 -"	7514	London, England	47400
"/10-"	22806	London, England	56200
"/14-"	23937	London, England	64900
"/17-"	7211	London, England	45200
"/21-"	13774	London, England	43300
"/21-"	6966	Hamburg, Germany	37500
"/24-"	20751	London, England	55700
"/25-"	21639	London, England	58400
"/26-"	24483	Barcelona, Spain	33200
"/26-"	23793	London, England	52600
"/27-"	33699	London, England	51400
9/10-"	24427	London, England	47300
"/19-"	14621	Antwerp, Belgium	47200
6/2 -05	22913	Antwerp, Belgium	41200
"/2 -"	39777	Liverpool, England	44000
"/4 -"	22835	Manchester, England	41000
"/7 -"	21499	London, England	59500
"/10-"	34494	Antwerp, Belgium	40900
"/14-"	35678	Rotterdam, Holland	61100
"/14-"	34233	London, England	53200
5/1 -"	1059	Glasgow, Scotland	41800
"/4 -"	45496	London, England	50700
"/6 -"	14480	London, England	50500
"/9 -"	37289	London, England	50600
"/9 -"	45587	Rotterdam, Holland	49200
"/11-"	38695	Bremen, Germany	49500
"/12-"	45854	London, England	54600
"/12-"	23218	London, England	51400
"/13-"	24922	Antwerp, Belgium	49500
"/13-"	23451	Glasgow, Scotland	53000
"/13-"	26908	Hamburg, Germany	47500
"/14-"	36089	London, England	66800
"/16-"	36629	London, England	58200
"/27-"	46373	Manchester, England	59200
"/28-"	36119	London, England	57100
"/31-"	23050	Hamburg, Germany	44700
4/16-"	20086	Antwerp, Belgium	51200
"/16-"	36414	London, England	55100
"/19-"	22740	Glasgow, Scotland	51400
"/21-"	23341	Antwerp, Belgium	49900
"/28-"	35039	Hamburg, Germany	65800

15 In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

4122.

Filed June 26, 1911. Dan F. Elliotte, Clerk.

No. 4122.

R. J. DARNELL, INCORPORATED,
v.
ILLINOIS CENTRAL RAILROAD COMPANY and THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

The Joint and Several Demurrer of the Illinois Central Railroad Company and the Yazoo and Mississippi Valley — Company.

Defendants, Illinois Central Railroad Company and The Yazoo & Mississippi Valley Railroad Company, jointly and severally demur to the declaration of the plaintiff filed in this case, and for cause of demurrer say:

I.

No cause of action is stated in the declaration.

II.

The Constitution and statutes of the United States do not confer jurisdiction upon this court to try the issues involved in this case.

III.

The declaration shows on its face that it is an action to recover damages by way of reparation for alleged unreasonable freight charges, in the transportation of lumber between points in different states, to-wit: between Memphis, Tennessee, and New Orleans, Louisiana, and therefore the matters involved in this case are subject to the Act of Congress to Regulate Commerce and the amendments thereof, and under said Act and amendments thereof resort must be had by shippers in the first instance to the Interstate Commerce Commission, a tribunal established by said Acts for the de-
15½ termination in the first instance of the matters involved in this case; and the declaration shows on its face that the plaintiff has not applied to the Commission for the relief sought to be obtained in this case; and until a trial of the questions involved in this case before the Interstate Commerce Commission, this court is without jurisdiction.

The declaration shows on its face that the cause of action arising with respect to the several shipments set out in the exhibit to the declaration arose more that two years previous to the filing of this suit, and are therefore barred and defendants rely upon the statute

of limitations of two years as set out in the Act of Congress to Regulate Commerce and the amendments thereof.

CHAS. M. BURCH, *Attorney.*

STATE OF TENNESSEE,
Shelby County:

Joseph Hattendorf makes oath that he is General Freight Agent of the Illinois Central Railroad Company and The Yazoo & Mississippi Valley Railroad Company and that the foregoing demurrer is not filed for purposes of delay.

JOS. HATTENDORF.

Sworn to and subscribed before me, this 26 day of June, 1911.

GEO. W. SILVERTOOTH,
Notary Public.

I, Chas. M. Burch, hereby certify that I am counsel for the defendants in the above entitled cause, and that in my opinion the foregoing demurrer is well founded in point of law.

CHAS. M. BURCH.

16 In the Circuit Court of the United States, Western District of Tennessee, Western Division.

No. 4122.

Filed June 30, 1911. Dan F. Elliotte, Clerk.

No. 4122.

R. J. DARNELL (INCORPORATED)
vs.
ILLINOIS CENTRAL RAILROAD CO. and YAZOO & MISSISSIPPI VALLEY R. R. CO.

Memoranda Opinion upon Demurrer.

McCALL, *J.:*

I think that before this Court would have jurisdiction to hear and determine this case, that it should be alleged in the declaration that the plaintiff had filed its claim before the Interstate Commerce Commission and that an award had been made to it by said Commission, to be paid on or before a day fixed by the Commission and that the defendants had failed to pay said award within said time.

See:

Interstate Commerce Act as amended, 36 U. S. Statute at Large, Ch. 309, p. 554, Sec. 16.

There is no such allegation.

The first, second and third grounds of demurrer raise this ques-

tion, and I am of the opinion that said three grounds of demurrer are good, on the authority of

Texas & Pacific R. R. Co. vs. Abilene Cotton Oil Co., 204 U. S., 236;

Southern Ry. vs. Tift, 206 U. S, 428.

The fourth ground of demurrer, I think, is not well taken and is overruled

An order will be entered accordingly, sustaining the demurrer and dismissing the case for want of jurisdiction.

Twenty days are allowed plaintiff to amend, if it be so advised.

McCALL, J.

17 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said Court at a regular term thereof, begun and held for its May Term, A. D. 1911, at the United States Court House in the City of Memphis, in said District, on to-wit: the 30th day of June, A. D. 1911, in the following cause, to-wit:

No. 4122.

R. J. DARNELL, INC.,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY and THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

This cause came on to be heard upon the declaration of the plaintiff and the demurrer of the defendants. Whereupon the court is of the opinion, and it is ordered, adjudged and decreed as follows:

1. That the first, second and third grounds of demurrer should be sustained for the reason that plaintiff has not applied in the first instance to the Interstate Commerce Commission to have adjudicated his right to reparation, and that such application to the interstate Commerce Commission is a condition precedent in this cause to any relief being granted by this court. The court is further of the opinion that the fourth ground of demurrer raising the statute of limitations of two years is not well taken, and should be overruled.

2. Permission is granted the plaintiff to amend its declaration, if it is so advised, by its counsel, declining to amend or plead further, it is ordered, adjudged and decreed that the suit be dis-

18 missed at plaintiff's costs.

To the action of the court in overruling the fourth ground of demurrer the defendants except, and the plaintiff also excepts to the action of the court in sustaining the first, second and third

grounds of demurrer, and excepts to the action of the court in dismissing plaintiff's suit.

19 In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

Filed Oct. 13, 1911. Dan F. Elliotte, Clerk.

No. 4122.

R. J. DARNELL, INCORPORATED, Plaintiff in Error,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY and YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Defendants in Error.

Petition for Writ of Error.

Now comes *the* R. J. Darnell, Incorporated, the plaintiff herein, and says that on or about June 30th, 1911, the Circuit Court of the United States for the Western Division of the Western District of Tennessee, entered a judgment herein in favor of the defendant, and against the plaintiff, in which judgment certain errors were committed to the prejudice of the plaintiff, all of which in more detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf on the Supreme Court of the United States for the correction of errors so complained of, and that the transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States

PERCY & HUGHES,
Attorneys for Plaintiff.

Allowed by

JNO. E. McCALL,
U. S. District Judge.

20 In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

Filed Oct. 13, 1911. Dan F. Elliotte, Clerk.

No. 4122.

R. J. DARNELL, INCORPORATED,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY and YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

Assignment of Errors.

The plaintiff in this action, in connection with his petition for writ of error, makes the following assignment of errors, which he avers exists:

1. The Court erred in sustaining the demurrer of the defendant.
2. The Court erred in dismissing the plaintiff's suit.
3. The Court erred in conceiving that no Federal question was involved.
4. The Court erred in conceiving that it was without jurisdiction or power to entertain the suit.
5. The Court erred in adjudging costs against the plaintiff.

Wherefore, the plaintiff prays that said judgment be reversed.

PERCY & HUGHES,
Attorneys for Plaintiff.

21 In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

Filed Oct. 13, 1911. Dan F. Elliotte, Clerk.

No. 4122.

R. J. DARNELL, INCORPORATED,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY and YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

Bond.

Know all men by these presents, that we, R. J. Darnell, Incorporated, and R. J. Darnell and W. A. Percy as Sureties, are held and firmly bound unto the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company, in the full and just sum of Five Hundred ($500.00) Dollars to be paid to the said Illinois Central Railroad Company and Yazoo & Mississippi Valley Railroad Company, their certain attorneys and assigns, for which payment well and truly to be made, we bind ourselves, our heirs, and

representatives and successors, jointly and severally by these presents.

Sealed with our seal-, this 13 day of Octo., in the year of our Lord, A. D. 1911.

Whereas, lately at the certain court of the United States in a suit pending in said court, between R. J. Darnell, Incorporated, Plaintiff, and the Illinois Central Railroad Company and Yazoo & Mississippi Valley Railroad Company, Defendants, a judgment was rendered against the said R. J. Darnell, Incorporated, and the said R. J.

22 Darnell, Incorporated, having obtained a writ of error and filed a copy thereof in the Clerk's office of said Court, reversed the judgment in the aforesaid suit, and a citation directed to the said Illinois Central Railroad Company and Yazoo & Mississippi Valley Railroad Company, citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden in the city of Washington, on the first Monday in October next.

Now, the condition of the above obligation is such that if the said R. J. Darnell, Incorporated, shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, otherwise, to remain in full force and effect.

Sealed and delivered, this the 13 day of Octo., 1911.

R. J. DARNELL, INCORPORATED,
By R. J. DARNELL, *Pres.*
R. J. DARNELL.
W. A. PERCY.

Attest:

R. J. WIGGS,
Sec. & Treas.

23 In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

Filed Oct. 13, 1911. Dan F. Elliotte, Clerk.

No. 4122.

R. J. DARNELL, INCORPORATED,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY and YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

Certificate of Judge as to Question of Jurisdiction.

In this cause, I hereby certify that the order of dismissal herein made is based solely on the ground that the declaration, in my opinion, discloses the infraction of no right arising under or out of the Federal laws or Constitution, of which this Court now has Jurisdiction, and that treating the demurrer as presenting this question of jurisdiction the suit is dismissed. There is no jurisdiction of the

cause of action set out in the declaration within the Circuit Court of the United States.

This certificate is made conforming to Act of Congress of March 3d, 1891, Chapter 517, and the opinion filed herein is made part of the record, and will be certified and set up as a part of the proceedings, together with this certificate.

JNO. E. McCALL,
District Judge, Holding Circuit Court of the United States for the Western District of Tennessee.

24 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court at a regular term thereof, begun and held for its May Term, A. D. 1911, at the United States Court House in the City of Memphis, in said District, on to-wit: the 13th day of October, A. D. 1911, in the following cause, to-wit:

L. D. # 5, Page 17.

No. 4122.

R. J. DARNELL, INCORPORATED,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY and YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

Order Granting Writ of Error.

This day comes the Plaintiff by its Counsel, Percy & Hughes, and present- and files herein its petition for a Writ of Error in this behalf, intended to be urged by it before the Supreme Court of the United States, together with its assignment of errors.

Upon Consideration Whereof, the prayer of said petition is granted and such Writ of Error awarded, upon said Plaintiff filing herein a Writ of Error Bond according to law, in the penal sum of Five hundred Dollars, ($500.00).

And it is further Ordered, upon application of said Counsel, that the Clerk of this Court prepare a full, true and correct copy
25 of the record and proceedings had herein, from which the said Appellant is to have the required number of copies printed for filing in said Supreme Court, as required by the Act of Congress relating thereto.

26 UNITED STATES OF AMERICA:

The Supreme Court of the United States.

The President of the United States to the Honorable Judges of the Circuit Court of the United States for the Western Division of the Western District of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of the United States, before you, or some of you between R. J. Darnell, Incorporated, as plaintiff and the Illinois Central Railroad Company and The Yazoo & Mississippi Valley Railroad Company, as defendants, a manifest error hath happened to the great damage of the said R. J. Darnell, Incorporated, as by its complaint appears. We be willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your Seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ of error, so that you have the same at Washington, D. C., on the 6th day of November, A. D. 1911, in said Supreme Court of the United States to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States, may cause further to be done therein to correct that error, what of right,
and according to the laws and customs of the United States,
27 should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States and the Seal of said Supreme Court, the 13 day of October, in the year of our Lord one thousand, nine hundred and eleven, and of the Independence the one hundred and thirty sixth year.

[Seal of the Circuit Court of the United States for the District of West Tennessee.]

[SEAL.] DAN F. ELLIOTTE,
Clerk of the Circuit Court of the United States of the Western District of Tennessee.

Allowed by:
JNO. E. McCALL,
United States District Judge.

As counselors for the within named defendant in error we, Chas. N. Burch and Fitzhugh & Biggs, and H. D. Minor, do hereby accept due and legal service of this Writ of Error and acknowledge to have received a true, perfect and correct copy of same.

CHAS. N. BURCH,
H. D. MINOR,
FITZHUGH & BIGGS,
Counsels for the said Defendant in Error.

28 UNITED STATES OF AMERICA:

The Supreme Court of the United States to the Illinois Central Railroad Company and The Yazoo & Mississippi Valley Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the City of Washington, D. C., on the 6th day of November, next, pursuant to writ of error filed in the Clerk's office of the Circuit Court of the United States for the Western District of Tennessee, Western Division, wherein the R. J. Darnell, Incorporated, is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this the 13 day of October, in the year of our Lord, one thousand, nine hundred and eleven, and of the Independence of the United States of America the one hundred and thirty-sixth year.

[SEAL.]

JNO. E. McCALL,
United States District Judge.

As counselors for the defendant in error herein mentioned, we, Fitzhugh & Biggs and Chas. N. Burch, and H. D. Minor, do hereby accept due and legal service of this Citation and acknowledge to have received a true, perfect and correct copy thereof.

CHAS. N. BURCH,
H. D. MINOR,
FITZHUGH & BIGGS,
Counsels for the said Defendant in Error.

29 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee:

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said Court at a regular term thereof, begun and held for its May Term, A. D. 1911, at the United States Court House in the City of Memphis, in said District, on to-wit: the 20th day of October, A. D. 1911, in the following cause, to-wit:

L. D. # 5, Page 17.

No. 4122.

R. J. DARNELL, INCORPORATED,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY and THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

Order Extending Time for Printing Record, Etc.

In this cause, it appearing to the Court that additional time should be allowed for printing the record and filing the same in the Supreme Court of the United States,

It is therefore hereby Ordered that the Appellant have, and is hereby allowed until January 1st, 1912, within which to print and file the required number of printed copies with the Clerk of said Supreme Court.

30 THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, Western District of Tennessee:

I, Dan F. Elliotte, Clerk of the Circuit Court of the United States, for the Western Division of said Western District of Tennessee, do hereby certify that the papers hereto attached, are full, true, perfect and correct copies of the originals and of the entire record and proceedings had (including the original Writ of Error and Citation) in said Court as the same now appears of record and upon the files in my office, in the following cause, to-wit:

No. 4122.

R. J. DARNELL, INCORPORATED,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY and YAZOO & MISSISSIPPI VALLEY RAILROAD CO.

In Testimony Whereof, I have hereunto written my name and affixed the Seal of said Court, at my office in the City of Memphis Tennessee, this 27th day of October, A. D. 1911 and of the Independence of the United States the 136th Year.

[Seal of the Circuit Court of the United States for the District of West Tennessee.]

DAN F. ELLIOTTE, *Clerk.*

Authentication.

I, Jno. E. McCall, a Judge of said Court, do hereby certify that Dan F. Elliotte, whose genuine signature appears to the foregoing

certificate is, and was at the date of the same, Clerk of said Court, and that his attestation is in due form.

JNO. E. McCALL,
Judge of the District Courts of the United States
for the District Aforesaid.

Endorsed on cover: File No. 22,963. W. Tennessee C. C. U. S. Term No. 887. R. J. Darnell, Incorporated, plaintiff in error, vs. Illinois Central Railroad Company and The Yazoo & Mississippi Valley Railroad Company. Filed December 11th, 1911. File No. 22,963.

27

Supreme Court of the United States

OCTOBER TERM, 1911.

Office Supreme Court, U. S.
FILED.
MAR 6 1912
JAMES H. McKENNEY
Clerk

No. 887.

R. J. DARNELL (Incorporated),
Plaintiff in Error,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY

and

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY,
Defendants in Error.

MOTION TO DISMISS WRIT OF ERROR AND BRIEF IN SUPPORT THEREOF.

CHARLES N. BURCH,
H. D. MINOR,
Attorneys for Defendants in Error.

BLEWETT LEE,
Of Counsel.

E. H. Clarke & Bro., Memphis, Tenn. 48771

Supreme Court of the United States

OCTOBER TERM, 1911.

R. J. DARNELL, Incorporated,
Plaintiff in Error.

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, and THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY,
Defendants in Error.

No. 887.

MOTION TO DISMISS WRIT OF ERROR

The Illinois Central Railroad Company and The Yazoo & Mississippi Valley Railroad Company, defendants in error in the above entitled cause, move to dismiss the writ of error heretofore sued out for the reason that this cause should have been prosecuted in error to the United States Circuit Court of Appeals for the Sixth Circuit, and not to this Court, in that there is not in issue in this cause a question of the jurisdiction of the United States Circuit Court as a Federal Court,

and in that the decision of the United States Circuit Court in dismissing this suit was on the ground that the suit was prematurely brought (without the plaintiff in error first obtaining an award from the Interstate Commerce Commission), and in that a question of jurisdiction is not in issue in the sense of the 5th Section of the Act of March 3rd, 1891, Chapter 517, 26 Statutes at Large, page 826, United States Compiled Statutes, 1901, page 549.

CHARLES N. BURCH,

H. D. MINOR.

Attorneys for Defendants in Error.

BLEWETT LEE,

Of Counsel.

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1911

R. J. DARNELL, Incorporated
Plaintiff in Error,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY and THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY,
Defendant in Error.

No. 887

BRIEF IN SUPPORT OF THE FOREGOING MOTION TO DISMISS WRIT OF ERROR

The Pleadings

On June 24th, 1911, the Plaintiff, R. J. Darnell, Incorporated, filed its declaration in this cause alleging that it was a corporation organized under the laws of the State of Tennessee, and that defendant, Illinois Central Railroad Company, was a corporation organized under the laws of the State of Illinois, and that Defendant, The Yazoo & Mississipppi Valley Railroad Company, was a corporation organized under the laws of the State of Mississippi.

The declaration averred that the plaintiff was a manufacturer of hardwood lumber in the city of Memphis, Tennessee, and that from January 20th, 1905, up to August 1st, 1908, it had shipped over the lines of the defendants, from Memphis to New Orleans, 35,424,949 pounds of hardwood lumber, and that there had been exacted by the defendants of the plaintiff a rate of 12 cts. per 100 lbs. The declaration further averred that said rate of 12 cts. per 100 lbs. was illegal, excessive and unreasonable to the extent of 2 cts. per 100 lbs., and that on the tonnage shipped it was entitled to recover said 2 cts. per 100 lbs., making a total of $7,084.89, as to which plaintiff prayed for judgment. There was attached to the declaration an exhibit showing the date of each shipment, the number of the car in which the shipment was made, and the weight.

The declaration further averred that a rate of 10 cts. per 100 lbs. had been in effect on hardwood lumber from Memphis to New Orleans from 1883 up to February 2nd, 1903, when the defendants without justification, advanced said rate to 12 cts. per 100 lbs.

The declaration further alleged that on June 20th, 1907, the J. W. Thompson Lumber Company and other manufacturers and shippers of hardwood lumber from Memphis to New Orleans had filed a petition with the Interstate Commerce Commission against the defendants and assailed the validity and reasonableness of said rate of 12 cts. per 100 lbs., and that this petition was answered by the defendants, and after a hearing the

Interstate Commerce Commission, on June 1st, 1908, had entered an order directing the defendants to cease and desist from charging said rate of 12 cts. per 100 lbs., and fixing 10 cts. per 100 lbs., as a maximum rate on hardwood lumber from Memphis to New Orleans, and that in obedience to this order, the defendants, by a tariff effective August 1st, 1908, had put in effect the old rate of 10 cts. per 100 lbs.

It was further averred in the declaration that pursuant to further proceedings had in said J. W. Thompson Lumber Company case, the Interstate Commerce Commission had awarded reparation for sundry amounts to the petitioners in the J. W. Thompson Lumber Company case, but that plaintiff (R. J. Darnell, Incorporated) *was not* a party to said proceedings. (R. 1-3.)

It is therefore apparent from the above statement, that the plaintiff in this case is attempting to recover reparation without first having submitted to the Interstate Commerce Commission its claim for reparation and having said claim checked, audited and revised and adjudicated by the Commission.

To the declaration the defendants, on June 26th, 1911, filed their joint and several demurrer. Four causes of demurrer are set out (R. p. 19), but the demurrer involves substantially two questions. First, the defendants demurred for the reason that the plaintiff was not entitled to recover any reparation at all until it had first resorted to the Commission and obtained an award of reparation. Second, defendants demurred for the reason that

the cause of action was barred by the statute of limitations of two years, as provided in the Act to Regulate Commerce.

The court sustained the grounds of demurrer which set up the defense that plaintiff was not entitled to recover for the reason that it had not, in the first instance, resorted to the Commission, and overruled the last ground of demurrer setting up the statute of limitations. The following opinion was filed by the court: (R. 20)

> "I think that before this Court would have jurisdiction to hear and determine this case, that it should be alleged in the declaration that the plaintiff had filed its claim before the Interstate Commerce Commission and that an award had been made to it by said Commission, to be paid on or before a day fixed by the Commission and that the defendants had failed to pay said award within said time
>
> See:
>
> Interstate Commerce Act as amended 36 U. S. Statute at Large, Ch., 309 p. 554, Sec. 16.
>
> There is no such allegation.
>
> "The first, second and third grounds of demurrer raise this question, and I am of the opinion that said three grounds of demurrer are good, on the authority of
>
> Texas & Pacific R. R. Co. *vs.* Abilene Cotton Oil Co., 204 U. S. 236;
>
> Southern Ry. *vs.* Tift, 206 U. S. 428.
>
> "The fourth ground of demurrer, I think, is not well taken and is overruled.

"An order will be entered accordingly, sustaining the demurrer and dismissing the case for want of jurisdiction.

"Twenty days are allowed plaintiff to amend, if it be so advised."

McCALL, *J.*"

The following order was entered upon the minutes of the court:

"This cause came on to be heard upon the declaration of the plaintiff and the demurrer of the defendants, whereupon the court is of the opinion, and it is ordered, adjudged and decreed as follows:

"1. That the first, second and third grounds of demurrer should be sustained for the reason that plaintiff has not applied in the first instance to the Interstate Commerce Commission to have adjudicated his rights to reparation, and that such application to the Interstate Commerce Commision is a condition precedent in this cause to any relief being granted by this court. The court is further of the opinion that the fourth ground of demurrer raising the statute of limitations of two years is not well taken, and should be overruled.

"2. Permission is granted the plaintiff to amend its declaration, if it is so advised, (and plaintiff) by its counsel, declining to amend or plead further, it is ordered, adjudged and decreed that the suit be dismissed at plaintiff's costs.

"To the action of the court in overruling the fourth ground of demurrer the defendants except, and the plaintiff also excepts to

the action of the court in sustaining the first, second and third grounds of demurrer, and excepts to the action of the court in dismissing plaintiff's suit." R. pp. 21-22.

(The words in brackets inadvertently omitted in transcribing or printing the record.)

Later, but during the same term, the following certificate was filed by the trial judge:

"In this cause, I hereby certify that the order of dismissal herein made is based solely on the ground that the declaration, in my opinion, discloses the infraction of no right arising under or out of the Federal laws or Constitution, of which this Court now has jurisdiction, and that treating the demurrer as presenting this question of jurisdiction the suit is dismissed. There is no jurisdiction of the cause of action set out in the declaration within the Circuit Court of the United States.

"This certificate is made conforming to Act of Congress of March 3d, 1891, Chapter 517, and the opinion filed herein is made part of the record, and will be certified and sent up as a part of the proceedings, together with this certificate.

JOHN E. McCALL,
District Judge, Holding Circuit Court of the United States for the Western District of Tennessee."

(R. pp. 24-25.)

The Meaning of Section 5 of the Judiciary Act of 1891.

Section 5 of the Judiciary Act of 1891 (otherwise known as the Evarts Act) provides in the first two paragraphs, as follows:

> "That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:
>
> "In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

The meaning of this section of the Evarts Act has been declared by this Court in a great number of cases, but we deem it necessary to cite only a few of those cases. It has been consistently ruled by this Court that the jurisdiction referred to in the Act is jurisdiction of the court as a *Federal court*, and unless such jurisdiction is involved the appeal lies not to this Court, but to the Circuit Court of Appeals; in other words, quasi-jurisdictional questions do not go direct to this Court, but to the Circuit Court of Appeals.

> Louisville Trust Co., *vs.* Knott, 191 U. S. 225.
>
> United States *vs.* Congress Construction Co., decided by the U. S. Supreme Court December 4th, 1911.

When the declaration and demurrer are examined in connection with the opinion, order and certificate of the court, it is apparent that the jurisdiction of the court as a Federal court was not in issue, but that the decision of the court was made *in the exercise* of its jurisdiction. By the express terms of Section 16 of the Interstate Commerce Act, not only Federal courts, but State courts have jurisdiction to entertain suits to recover reparation by reason of excessive or unreasonable charges, but before either a State court or a Federal court can entertain a suit of this kind the party claiming reparation must in the first instance have resorted to the Interstate Commerce Commission and obtained an award of reparation. A party is not entitled to sue without first resorting to the Commission. This has been the construction of the Interstate Commerce Act, notwithstanding that Section 9 of the Interstate Commerce Act authorizes suit to be brought either before the Commission or in any district or circuit court of the United States, and is the only construction which effects the prime purposes of the Interstate Commerce Act and makes it a consistent whole.

Texas & P. Ry., *vs.* Abilene Cotton Oil Co., 204 U. S., 426.

Robinson *vs.* Baltimore & O. R. R. Co., decided by the U. S. Supreme Court, January 9th, 1912.

There was, therefore, not in issue the jurisdiction of the circuit court as a Federal court, but

the court in sustaining the demurrer applied a rule equally applicable to all State and Federal courts, to-wit, the necessity of the plaintiff showing that it had complied with the Interstate Commerce Act, as construed in the Abilene Cotton Oil Company case, by in the first instance resorting to the Commission and having its claim adjudicated. This can not be said to be a question of jurisdiction any more than a question of jurisdiction is involved if a suit is dismissed because the party bringing it fails to give a proper bond for costs.

A case very much in point is that of Illinois Cent. R. R. *vs.* Adams, 180 U. S. 28. In that case there was a defense interposed under Equity Rule 94, which requires that a bill brought by a stockholder in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must show that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved upon him by operation of law, that the suit is not collusive, and the bill must set forth the efforts which he made to have corporate action taken by the directors of the corporation, and the causes of his failure to obtain such corporate action.

It was insisted in that case that the bill failed to comply with this equity rule, and that, therefore, the court was without jurisdiction. This Court held that the question was not one of jurisdiction, but one of the *authority* of the plaintiff to maintain his suit.

So, in the case at bar, it is not the jurisdiction of the court that is in issue, but the authority of the plaintiff to maintain its suit in any court until it first obtains an award from the Commission.

In the case just cited, this Court said:

> "Assuming under the affidavit of Adams, though made only upon information and belief, that the plaintiff, the Illinois Central, owns a majority of the stock of the Canton Company, we are still of the opinion that the defense set up under the 94th Rule does not raise a question of jurisdiction, but of the authority of the plaintiff to maintain this bill. Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence. It exists in the circuit courts of the United States under the express terms of the Act of August 13, 1888, if the plaintiff be a citizen of one State, the defendant a citizen of another, if the amount in controversy exceed $2,000, and the defendant be properly served with process within the district. Excepting certain quasi jurisdictional facts, necessary to be averred in particular cases, and immaterial here, these are the only facts required to vest jurisdiction of the controversy in the circuit courts. It may undoubtedly be shown in defense that plaintiff has no right under the allegations of his bill or the facts of the case to bring suit, but that is no defect of jurisdiction, but of title. It is as much so as if it were sought to dismiss an action of ejectment for the want of jurisdiction, by showing that the plaintiff had no title to the land in controversy. At common law, neither an infant, an insane

person, married woman, alien enemy, nor person having no legal interest in the cause of action, can maintain a suit in his or her own name; but it never would be contended that the court would not have jurisdiction to inquire whether such disability in fact existed, nor that the case could be dismissed on motion for want of jurisdiction. The right to bring a suit is entirely distinguishable from the right to prosecute the particular bill. One goes to the maintenance of any action; the other to the maintenance of the particular action. Thus it was held in the case of Smith *vs.* McKay, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep., 490; and Blythe *vs.* Hinckley, 173 U. S., 501, 43 L. ed., 783, 19 Sup. Ct. Rep. 497, that it was not a question of the jurisdiction of the circuit court that the action should have been brought at law instead of in equity. The question in each case is whether the plaintiff has brought himself within the language of the jurisdictional act, whatever be the form of of his action, or whether it be at law or in equity. The objection that plaintiff has failed to comply with the 94th Rule may be raised by demurrer, but the admitted power to decide this question is also an admission that the court has jurisdiction of the case."

See also:

Venner *vs.* Great Northern Railway, 209 U. S. 24.

Again, this Court has said that a question of jurisdiction is not involved in the dismissal of a suit because brought on the equity side of the court, when it should have been brought on the

law side. In Blythe *vs.* Hinckley, 173 U. S. 506, Chief Justice Fuller said:

> "Appeals or writs of error may be taken directly from the circuit courts to this court in cases in which the jurisdiction of those courts is in issue, that is, their jurisdiction as Federal courts, the question alone of jurisdiction being certified to this court. The circuit court held that the remedy was at law and not in equity. That conclusion was not a decision that the circuit court had no jurisdiction as a court of the United States. Smith *vs.* McKay, 161 U. S. 355 (40:731); Blythe Company *vs.* Blythe (mem.) 172 U. S. 644.
>
> "The circuit court dismissed the bills on another ground, namely, that the judgments of the State courts could not be reviewed by that court on the reasons put forward. This also was not in itself a decision of want of jurisdiction because the circuit court was a Federal court, but a decision that the circuit court was unable to grant relief because of the judgments rendered by those other courts.
>
> "If we were to take jurisdiction on this certificate, we could only determine whether the circuit court had jurisdiction as a court of the United States, and as the decree rested on no denial of its jurisdiction as such, but was rendered in the exercise of that jurisdiction, it is obvious that this appeal cannot be maintained in that aspect."

The same doctrine was reaffirmed in Louisville Trust Co. *vs.* Knott, 191 U. S. 233, wherein this Court said:

"In all this there was nothing involving the jurisdiction of the circuit court as a Federal tribunal, whose jurisdiction is regulated by acts of Congress. The question of jurisdiction which the statute permits to be certified to this court directly must be one involving the jurisdiction of the circuit court as a Federal court, and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other."

Likewise, it was held in Courtney *vs.* Pradt, 196 U. S. 89, that the dismissal by a Federal court of a suit against a foreign executor on the ground of want of jurisdiction in the State court, from which the case had been removed for diversity of citizenship, does not present a question of jurisdiction In the meaning of Section 5 of the Evarts Act.

It is deemed unnecessary to cite other authorities, for the reason that this Court has in a very recent opinion fully considered and reviewed the authorities on the question now under consideration, in the case of United States *vs.* Congress Construction Company, decided December 4th, 1911. In that case Mr. Justice Van Devanter clearly points out the distinction between the opinions of the Court wherein a question of jurisdiction was in issue and those cases where the point in issue was merely the authority of the party to maintain his suit or the point in issue was some general defense applicable to all courts alike. Furthermore, there is no question in this case

involving a defense that this suit should have been brought in some other district than the one in which it was brought. In fact, there could be no such question, as the Interstate Commerce Act (Section 16) authorizes suit on a reparation award to be brought in any State court of general jurisdiction or in any circuit court of the United States for the district in which the plaintiff resides or in which is located the principal operating office of the carrier or through which the road of the carrier runs.

The point here involved is that this plaintiff (or any other plaintiff) has no right to maintain an action to recover reparation until it has first resorted to the Commision and had its claim to reparation adjudicated by that tribunal.

This was the point on which the action of the plaintiff in this case was dismissed. While the District Judge in his certificate does state that there is no jurisdiction of the cause of action set out in the declaration within the circuit court of the United States, yet it is apparent from reading the whole of the certificate in connection with the pleadings and in connection with the opinion and order of the court, that the sole question involved was the authority of the plaintiff to maintain a suit at all in any court until the plaintiff had first resorted to the Commission for an adjudication of its claim.

It may not be inappropriate to add that the trial judge was clearly correct in holding that the plaintiff could not maintain its action without first resorting to the Commission. The action

of the trial judge is in accord with the opinion rendered by this Court in Texas & P. R. Co. *vs.* Abilene Cotton Oil Company, 204 U. S. 236, and with an opinion rendered by this Court (since the decision of this case by the trial judge) in Robinson *vs.* Baltimore & O. R. Co., decided January 9th, 1912.

It is, therefore, respectfully submitted that the motion to dismiss the writ of error should be sustained.

Respectfully submitted,

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BLEWETT LEE,

Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

R. J. DARNELL (Inc.), Plaintiff in Error,

vs. No. 887.

ILLINOIS CENTRAL RAILROAD COMPANY

and

YAZOO & MISSISSIPPI VALLEY RAILROAD CO.,

Defendants in Error.

Brief for Plaintiff in Error Opposing Motion to Dismiss Writ of Error.

WM. A. PERCY,
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Paul & Douglass Co., Printers, Memphis.

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ILLINOIS CENTRAL RAILROAD COMPANY

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Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR OPPOSING MOTION TO DISMISS WRIT OF ERROR.

THE PLEADINGS.

The declaration filed by R. J. Darnell (Inc.), lumber manufacturers, at Memphis, Tennessee, against the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company showed that on February 2, 1903, the rate on hardwood lumber in carload lots from Memphis to New Orleans was advanced by the defendants from 10 cents to 12 cents per hundred pounds. It was averred that the rate was excessive and extortionate, and deprived all persons who used same of their property without due process of law, to the extent of 2 cents per hundred pounds. The 12-cent rate remained in effect until August 1, 1908, during which time the amount of excess freight charges paid by the plaintiff amounted to $7,084.89, for the recovery of which suit was brought.

It was averred that a petition was filed on June 20, 1907, by the J. W. Thompson Lumber Company et al., manufacturers

and shippers of hardwood lumber, at Memphis, before the Interstate Commerce Commission against the defendants in error, attacking the validity of the advance in rate from 10 cents to 12 cents, and such proceedings were had therein as that on the first of June, 1908, the Interstate Commerce Commission entered an order adjudging the 12-cent rate excessive, and fixing the maximum rate at 10 cents, and awarding reparation.

It was averred that the plaintiff was not a party to this proceeding, but has brought his suit based upon the order of the Commission therein to recover the excessive amount which he has paid. The defendants interposed a demurrer in part as follows:

I.

"No cause of action is stated in the declaration.

II.

The Constitution and statutes of the United States do not confer jurisdiction upon this Court to try the issues involved in this case.

III.

The declaration shows on its face that it is an action to recover damages by way of reparation for alleged unreasonable freight charges, in the transportation of lumber between points in different States, to-wit, between Memphis, Tennessee, and New Orleans, Louisiana, and therefore the matters involved in this case are subject to the Act of Congress to Regulate Commerce and the amendments thereof, and under said act and amendments thereof resort must be had by shippers in the first instance to the Interstate Commerce Commission, a tribunal established by said acts for the determination in the first instance of the matters involved in this case, and the declaration shows on its face that the plaintiff has not applied to the Commission for the relief sought to be obtained in this case, and until a trial of the questions involved in this case before the Interstate Commerce Commission, this Court is without jurisdiction."

Upon the hearing of the demurrer the district judge rendered this opinion:

"I think that before this Court would have jurisdiction

to hear and determine this case, that it should be alleged in the declaration that the plaintiff had filed its claim before the Interstate Commerce Commission, and that an award had been made to it by said Commission, to be paid on or before a day fixed by the Commission, and that the defendants had failed to pay said award within said time.

See:

Interstate Commerce Act as amended, 36 U. S. Statute at Large, Ch. 309, p. 554, Sec. 16.

There is no such allegation.

The first, second and third grounds of demurrer raise this question, and I am of the opinion that said three grounds of demurrer are good, on the authority of—

Texas & Pacific R. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 236.

Southern Ry. v. Tift, 206 U. S. 428."

The order of the Court was as follows:

"1. That the first, second and third grounds of demurrer should be sustained for the reason that plaintiff has not applied in the first instance to the Interstate Commerce Commission to have adjudicated his right to reparation, and that such application to the Interstate Commerce Commission is a condition precedent in this cause to any relief being granted by this Court. The Court is further of the opinion that the fourth ground of demurrer raising the statute of limitations of two years is not well taken, and should be overruled.

2. Permission is granted the plaintiff to amend its declaration, if it is so advised, but its counsel declining to amend or plead further, it is ordered, adjudged and decreed that the suit be dismissed at plaintiff's costs."

From this order of Court the plaintiff filed his petition for writ of error to the Supreme Court of the United States, and has assigned as error the action of the Court in sustaining the demurrer and dismissing the suit.

The trial judge certified as follows:

"In this cause I hereby certify that the order of dismissal herein made is based solely on the ground that the declaration, in my opinion, discloses the infraction of no right arising under or out of the Federal laws or Constitution, of which this Court now has jurisdiction, and

that treating the demurrer as presenting this question of jurisdiction the suit is dismissed. There is no jurisdiction of the cause of action set out in the declaration within the Circuit Court of the United States.

This certificate is made conforming to act of Congress of March 3d, 1891, Chapter 517, and the opinion filed herein is made part of the record, and will be certified and set up as a part of the proceedings, together with this certificate."

BRIEF.

Under Section 5 of the Judiciary Act of 1891 the case at bar is one which most aptly illustrates an instance for the issuance of the writ of error from the Supreme Court of the United States to a Circuit Court.

The propriety of the issuance of the writ from the Supreme Court of the United States is settled by—

Mitchell Coal & Coke Co. v. Pennsylvania R. R. Co., 192 Fed. 475,

And

Morrisdale Coal Co. v. Pennsylvania R. R. Co., 183 Fed. 929,

and cases there cited.

These two cases contain complete reviews of all the decisions of the Supreme Court of the United States up to the time of their rendition.

The cases cited by opposing counsel (except United States v. Congress Construction Co., decided December 4, 1911) are also reviewed.

Mitchell Coal & Coke Co. v. Pennsylvania Railroad Company was as follows:

"Act of Congress, March 3, 1891, Ch. 517, 26 Stat. 826, establishing the Circuit Court of Appeals, provides by Section 5 (U. S. Comp. St. 1901, p. 549), that appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in any case in which the jurisdiction of the Court is at issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision. Section 6 declares that the Circuit Court of Appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the existing circuit courts in all cases other than those pro-

vided for in the preceding section, unless otherwise provided by law, and that the decree of the Circuit Court shall be final in all cases in which the jurisdiction is dependent entirely on the opposite parties being aliens and citizens of the United States, or citizens of different States, also in all cases arising under the patent laws, the revenue and criminal laws, and in admiralty cases. Held, that where a suit against an interstate carrier to recover damages for violation of Interstate Commerce Act, February 4, 1887, Ch. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), in giving rebates to one of plaintiff's competitors, was dismissed because the Circuit Court prior to action by the Interstate Commerce Commission had no jurisdiction of the subject-matter, such objection constituted an attack on the Court's jurisdiction as a Federal court, and hence the Circuit Court of Appeals had no jurisdiction to entertain a writ of error to review the same."

In Morrisdale Coal Co. v. Pennsylvania Railroad Co., the Morrisdale Coal Company had sued to recover from the Pennsylvania Company damages for violation of that section of the Interstate Commerce act which forbade the giving of undue preferences. There had been no proceedings before the Commission to establish that the rules of the railroad company complained of created an undue preference against plaintiff.

It was held that the shippers had no right to maintain an action in the Court in advance of action by the Interstate Commerce Commission.

It was further held that if the case in the District or Circuit Court is dismissed by final judgment or decree, either for want of jurisdiction of the parties or for want of power as a Federal court to take jurisdiction of the subject-matter, or any other question, so that the only question presented by the record is such question of jurisdiction, the judgment or decree can be reviewed by the Supreme Court only.

The attention of the Court is directed to the opinion of Judge Buffington, who dissented, as well as the opinion of the majority of the Court, both of which opinions are to the point that the appeal or writ of error in a case such as the one now before the Court lies only to the Supreme Court of the United States.

The only decision of the Supreme Court of the United States mentioned in the brief of opposing counsel that is not discussed

in the two cases just mentioned is that of the United States v. Congress Construction Company, decided December 4, 1911.

An inspection of that case shows that the appeal from the Circuit Court of the United States for the Northern District of Illinois to the Supreme Court of the United States was sustained. The Court said: "Here the jurisdiction of the Circuit Court in the sense of its power to entertain the action in view of the statute provisions bearing upon the place for bringing such an action was directly in issue, and so the case is rightly here under the direct writ of error. The motion to dismiss is accordingly denied."

It is authority for rather than against the jurisdiction of the Supreme Court.

As to the Merits.

The brief of opposing counsel upon this motion to dismiss suggests that "it might not be inappropriate to add the trial judge is clearly correct in holding that the plaintiff could not maintain its action without first resorting to the Commission." *This suggestion seems to us exceedingly inappropriate.* But if it were admissible to now present for the consideration of the Court the propriety of the judgment of the trial judge in dismissing the plaintiff's suit, we would point out that in the case at bar we are strictly following the rule laid down in the Abiline Cotton Oil Co. case, 204 U. S. 236, and reaffirmed in Robinson v. Baltimore & Ohio Railroad, decided by the Supreme Court of the United States, June 9, 1911.

The declaration sets out a finding by the Interstate Commerce Commission that the rate was excessive, and reparation was awarded. It sets out the reduction of the rate pursuant to the order of the Commission; it asks for a shipper not a party to the proceedings before the Commission, a recovery of the excessive rate, the measure of the excess having been determind in a proceeding before the Commission. There exists no reason for abridging to the shipper the right to bring his action in court to recover the excess.

The position of the plaintiff in error is that application for the determination as to the reasonableness of the rate *has already been made* to the Interstate Commerce Commission, and a proper rate there ascertained. To entitle him to recover nothing further remains to be done save to prove that he paid the excessive rate to the amount sued for.

It is not necessary for every shipper, either individually or

as one of a number, to institute proceedings contesting a rate in order thereafter to maintain a suit at law for the recovery of the excessive exactions. It is sufficient if in any proper proceeding the rate has been finally ascertained to be excessive and a reasonable rate established by the Interstate Commerce Commission.

This suit is filed under Section 9 of the Act to Regulate Commerce, that "Any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission, as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction. But such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

Section 22 also provided that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute; but the provisions of this act are in addition to such remedies."

The right which a shipper had at common law to have his property transported at a reasonable rate was a property right which, if infringed, gave him a right to sue before the courts, and have a trial on the issue by a jury.

Hutchinson on Carriers, 3 Ed., Sec. 805.
London Ry. Co. v. Evershed (L. R. Rep.), 3 App. Cases, 1329.
Louisville & Nashville Ry. Co. v. Wilson, 119 Ind. 353, 21 N. E. 341.
Same v. Same, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 105.
It may be assigned. Edmunds v. I. C. R. R., 80 Fed. 78.

At common law, an action will lie against a common carrier for an unreasonable and excessive freight charge, but it is said not for a mere discrimination in favor of another shipper.

Cowden v. Pacific Coast Steamship Co., 94 Cal. 470, 29 Pac. Rep. 873, 18 L. R. A. 1.
Southern Ry. v. Anniston, 135 Ala. 415, 33 So. Rep. 274.
Johnson v. Pensacola R. R., 16 Fla. 623, 26 Am. St. Rep. 731.

The last case shows the point of view of our courts prior to the passage of the various state and national acts regulating commerce.

The payment of an overcharge of freight to a railroad, although made without objection, is not a voluntary payment. The shipper and carrier do not stand on an equality.

Louisville & Nashville Ry. Co. v. Wilson, supra.
Cook v. Chicago R. R., 81 Ia. 551, 46 N. E. 1080, 25 Am. St. Reps. 572, 9 L. R. A. 764.

In the case of the Citizens Bank v. Nantucket Steamboat Co., 2 Story, page 16, Judge Story, in disposing of the question of the compensation to the carrier, says:

> "I agree that it is not necessary that the compensation should be a fixed sum, or known as freight; for it will be sufficient if a hire or recompense is to be paid for the service, in the nature of a *quantum meruit* to or for the benefit of the company. The carrier was entitled to reasonable compensation without contract, and the shipper was likewise entitled to a reasonable rate without contract."

Prior to the passage of the Interstate Commerce Act, the common law prevailed that carriers should charge a reasonable rate.

Interstate Commerce Commission v. Baltimore & Ohio Railroad Co., 145 U. S. 263.

In the case of Chicago, Milwaukee & St. Paul Ry. v. Minnesota, 134 U. S. 418, the right of the carrier to charge a reasonable rate and the right of the shipper to have his goods carried for a reasonable rate are extensively discussed and each right is described to be a property right. In the concurring opinion Mr. Justice Miller says:

> "Neither the Legislature nor such Commission, acting under the authority of the legislature, can establish arbitrarily and without regard to justice and right a tariff of rates for such transportation which is so unreasonable as to practically destroy the value of property of persons engaged in the carriage of the business on the one hand, nor so exorbitant and extravagant as to be in utter disregard of the rights of the public for the use of such transportation on the other hand."

Here we may add neither Congress nor its creature, the

Interstate Commerce Commission, has any more power in this respect than a State Legislature.

Smyth v. Ames, 169 U. S. 527.

In this connection we assert that when the Commission has fixed a rate as the *maximum of reasonableness, a prima facie* deduction follows that any sum in excess of that falls under the condemnation of the opinion of Mr. Justice Miller, as being so exorbitant and extravagant as to be confiscatory of the property rights of the shipper to have his property carried at a reasonable rate.

In the Burgess case, the Interstate Commerce Commission describes the right of the shipper to such excess as a legal right. (13 I. C. C. Rep. 680.) The Supreme Court, in the case of Texas & Pacific Railroad Co. v. Abilene Cotton Oil Company, 204 U. S. 436, says:

> "Without going into detail, it may not be doubted that at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in damages. It is also beyond controversy that when a carrier accepted goods without payment of the cost of carriage or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge. And it may further be conceded that it is now settled that even where, on the receipt of goods by a carrier, an exorbitant charge is stated, and the same is coercively exacted either in advance or at the completion of the service, an action may be maintained to recover the overcharge."

In the Abilene Cotton Oil case, the Supreme Court found it necessary in order to make the Interstate Commerce act work out the result which was indicated by its general provisions, to limit the right of the shipper to go into court and recover for wrongs resulting from violations of the act, *until after the Interstate Commerce Commission* had acted and adjudged the rate complained of unreasonable. It might be contended that this action of the Supreme Court was rather judicial legislation than judicial construction, and that it would have been more in consonance with the Constitution for the Supreme Court to have given that effect to the language of the act which it seemed to intend, and if it wrought havoc with other parts of the act,

let Congress correct such result by an amendment to the act. However that may be, and the force of Mr. Justice White's reasoning cannot be denied, it is certain that the limitation upon the right of the shipper to sue in the courts will not be extended beyond the case which the Supreme Court then had before it, a case where the rate was still operative and legal, and still being paid by all shippers.

The Abilene case, so far from adjudging that a shipper could not exercise his election and go into court after a rate had been declared unreasonable and excessive, and the railroads had complied with such an order and established a lower rate, intimates as strong as language can make it that this right of action remains open to the shipper, for the Court says:

> "The independent right of an individual *originally* to maintain actions in a court to obtain pecuniary redress for violations of the act covered by the Ninth Section, must be confined to the redress of such wrongs as can consistently with the context of the act be redressed by courts without *previous* action by the Commission, and, therefore, does not imply the power in a court to *primarily* hear complaints concerning wrongs of the character of the one here complained of."

And in its concluding sentence the Court declared that the shipper who complains of an unreasonable rate must *primarily* invoke redress through the Interstate Commerce Commission.

In the Tift case, 206 U. S., referring to the Abilene Cotton Oil Company case, the Supreme Court said:

> "The judgment was reversed by this Court on the ground that the State courts had no jurisdiction to entertain a suit based on the unreasonableness of a rate as published *in advance* of the action of the Interstate Commerce Commission adjudging the rate unreasonable."

The Southern Railway v. Tift was a case where before an advance in rates became effective the shippers enjoined, in the United States Circuit Court, the rate from becoming effective, and by agreement the temporary injunction was dissolved, the parties stipulating that in the event the advance should ultimately be held excessive a decree of restitution should be entered. The advance was found excessive by the Interstate Commerce Commission, and this particular branch

of the case was before the Supreme Court upon objections to the Master's report as to the amount of damages. The only significance of the reparation in this connection is that it was expressly decided that the Master could proceed and make his report; that the Court had jurisdiction to award reparation after the Commission had found the rate to be excessive. The stipulation of counsel is of no importance to confer jurisdiction. If the Court had no jurisdiction to award reparation, the parties could not by stipulation give it jurisdiction.

The case of Robinson v. Baltimore & Ohio R. R. Co., decided January 9, 1912, seems to thoroughly agree with the plaintiff's view of the proper manner to proceed in cases of this sort, for it would seem from that case that had the plaintiff, Robinson, when he filed his suit in the *nisi prius* court in West Virginia, alleged that the regulation which he claimed created a preference and damaged him had been condemned by the Interstate Commerce Commission in the case of Glade Coal Co. v. Baltimore & Ohio Railroad, and if such allegation had been true his action would have been maintainable, but the Supreme Court says that he neither based his right of recovery upon the decision of the Commission in the Glade Coal Company case, and if, as a matter of fact, he had so based his right, he would have been in no better plight, because the proposition upon which he relied was not decided in his favor by the Commission.

But, of course, these remarks on the merits are not proper for consideration on the question of jurisdiction, and perhaps we are not excusable in following the irrelevant comments of opposing counsel in this respect.

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